Supreme Court, U.S.
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No. 92-1034

In The
Supreme Court of the United States
October Term, 1992

SEMINOLE ELECTRIC COOPERATIVE, INC.,
Petitioner,

vs.

FLORIDA DEPARTMENT OF REVENUE and
GERALD R. LEWIS,
as Comptroller of the State of Florida,
Respondents.

On Petition for Writ of Certiorari
To The District Court of Appeal of Florida
Second District

BRIEF IN OPPOSITION FOR RESPONDENTS

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STATEMENT

The case involves the constitutionality of a Florida sales tax — repealed effective January 1, 1988 — as it was imposed on a Florida purchaser of interstate transportation services. A Florida trial court found the tax unconstitutional. Petitioner then opposed Respondent's motion to have that decision certified for direct review by the Florida Supreme Court, arguing that the case was not one of great importance. Sem. Elec. Pet. 23 n.12. Florida's Second District Court of Appeal reversed, upholding the tax against the Commerce Clause challenge; it also refused rehearing and the Florida Supreme Court declined to review.

Between July and December 1987 a tax of five percent of the cost price was assessed on interstate transportation services with a point of origin or termination in Florida. Fla. Stat. § 212.059(2) (1987). Petitioner operated two coal fired electric generating plants in Florida. During that time, it hired companies to transport coal from Illinois and Kentucky to Florida. Petitioner paid tax on one-half of the cost price of those coal transportation services terminating in Florida. Afterwards, it sought a refund.

The sole issue below was whether the tax passed muster under the Commerce Clause. Petitioner conceded at trial and on appeal that the first part of the test announced in *Complete Auto Transit Inc. v. Brady,* 430 U.S. 274 (1977), had been met. Florida had a substantial nexus to the activity being taxed. Sem. Elec. Pet. App. 3a, 12a. Petitioner also admitted that the tax was internally consistent and there was no possibility of multiple taxation. *Id.*[1]

The trial court found that no other state could tax the "separate event" made subject to Florida tax:

> Multiple taxation is impossible in this case since the tax is assessed by the state that is either the point of origin or the point of termination of the interstate transportation service. The tax is then only imposed on one-half of the cost of the transportation service. Thus, only two states can assess the tax and each can only impose the tax on half the transportation service cost.

* * *

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1 For the first time the Petitioner now contends that a risk of multiple taxation is present. Sem. Elec. Pet. 22. However, the record shows that the Petitioner admitted below that no risk of multiple taxation existed. The newfound argument should not form the basis for a decision to review the judgment below if the Court intends to confine review to the record and case made therein.

> There is no possibility of multiple taxation under Florida Statutes § 212.059(5) since only two states may tax the interstate coal transportation services and each state taxes ***a separate event.***

Id. at 12a-13a.

Nevertheless, the trial court ruled that the method of apportionment was unfair and struck the tax. It also ruled that the tax discriminated against interstate commerce and was not fairly related to the benefits provided by Florida. The trial court's opinion principally relied on *Goldberg v. Sweet,* 488 U.S. 252 (1989), *Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653 (1948) and *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. 266 (1987). The ruling was premised on the finding that mileage apportionment was feasible and that Florida taxed "more than the actual number of miles of transportation services that occur within the state." *Id.* at 14a.

Describing the tax imposed by Fla. Stat. § 212.059 (1987), Florida's Second District Court of Appeal found it to be a general tax on the sale or use of services performed, consumed or enjoyed within Florida. Sem. Elec. Pet. App. 2a-3a. A sale occurred when more than fifty percent of the service was performed within Florida. A use tax was imposed on the privilege of consuming a service, the benefit of which was enjoyed in Florida. *Id.* The tax "is not a tax on transportation per se. Neither is it a tax on the use of coal. It is a tax on the use of a transportation service." *Id.* at 4a. The sales and use tax was not computed based upon mileage; rather, it was determined for each transaction based upon the value of the service rendered. *Id.*

The Second District ruled that the tax was fairly apportioned. *Id.* at 5a. Applying *Goldberg,* the court noted that the Constitution does not specify a particular apportionment formula. Petitioner, it determined, derived "a direct and

substantial economic benefit" properly taxable where it was enjoyed. *Id.* at 4a. The Second District found apportionment between the two States with nexus, measurement by the value of each transaction and collection from the ultimate consumer. *Id.* at 5a. Credit was also noted as available for tax paid to other States. *Id.* at 3a.

The Second District also found that the tax did not discriminate. *Id.* at 6a. Having outlined the incidence of the tax and noted admissions on issues of nexus and risk of multiple taxation, it found the same tax burden on interstate transportation terminating and originating in Florida; no special preferences for Floridians engaged in interstate commerce; imposition on the full sales price when both point of origin and termination were in Florida, but on only one-half the sales price when just the point of origin or termination was in Florida; and a full credit for tax paid elsewhere on the same sale or use. *Id.* The Second District also held that the measure of the general revenue tax was fairly related to the benefit of services derived from Florida by the Petitioner, relying on *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 623 (1981). *Id.* at 7a.

ARGUMENT

Petitioner has shown no reason for review. The Second District applied establish law to the case presented. The importance of any federal question presented and the constitutional significance of any resultant decision is minimal given the force of Petitioner's admissions. Although Petitioner asserts that the Florida District Court disregarded governing constitutional principles, that court, in fact, applied *Complete Auto Transit* and its progeny in a wholly conventional manner based upon the facts and the case presented.

I. THE DECISIONS BELOW ARE NOT INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The Second District considered practical economic consequences. The tax at issue had the characteristics of a sales tax. Any potential difference ascribed to this tax from others long upheld by this Court was negated in the record below. The Second District's constitutional analysis mirrored that adopted by this Court in comparable circumstances. Nothing in the Petition indicates a need for clarification in this area of the law, especially when the controversy is premised upon the commercial impact of a statute which was repealed some six years ago.

The decision below is entirely consistent with the constitutional standards set forth by this Court. The States have considerable latitude in imposing general revenue measures. *Commonwealth Edison Company,* 453 U.S. at 622. Even prior to the Court's opinion in *Complete Auto Transit,* the Court had long upheld, against Commerce Clause challenges, sales and use taxes measured by gross charges. *E.g., McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 58 (1940). The *Complete Auto Transit* Court itself upheld a sales tax imposed on gross income derived from transportation, albeit between points within the State, proceeding on the assumption that the activity subject to tax was interstate commerce. 430 U.S. 276 n. 2. Applying the test in *D.H. Holmes Co. Ltd. v. McNamara,* 486 U.S. 24 (1988), the Court held that Louisiana's use tax was fairly apportioned since it provided a credit against use tax for sales taxes that had been paid to other States. *See also Wardair Canada Inc. v. Florida Department of Revenue,* 477 U.S. 1 (1986). Applying the test in *Goldberg,* the Court upheld a tax assessed on the gross charge for interstate telephone calls because the tax was fairly apportioned. The Second District thus broke no new ground in concluding that the Florida Legislature had

arrived at a permissible method of apportionment. Here, that court merely applied the accepted standards previously announced by this Court and rendered a decision which is plainly correct and does not merit further review.

1. The Petitioner incorrectly asserts that *Goldberg* announced a narrow "exception" to a requirement that mileage apportionment be used whenever it is feasible. *See* Sem. Elec. Pet. 15-18. Petitioner would essentially gut *Goldberg's* continued vitality by limiting the application of the Court's reasoning to cases involving long distance telephone calls. Certainly, this Court has "endorsed" apportionment formulas based upon mileage. *Goldberg,* 488 U.S. at 264-265. As a practical matter, apportionment formulae based upon mileage afford one method by which a State may avoid the risk of multiple taxation where many States might claim nexus. However, prior endorsement is not the constitutional test. And the Court has "declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.'" 488 U.S. at 261 *(quoting Container Corporation of America v. Franchise Tax Board,* 463 U.S. 159 (1983)). *Goldberg* leaves the States free to consider and to enact methods of taxation which afford "realistic legislative solution[s]" so long as, in their practical effect, they are not inconsistent with the goals underlying the Commerce Clause. The Second District's analysis simply applied this Court's opinions to the facts peculiar to this case and concluded, correctly, that the Florida Legislature's chosen method had not been shown unfair.

The potential vice in an excise tax measured by gross receipts is the risk of multiple taxation. Petitioner would, incorrectly, find support for mandating mileage apportionment from a decision made in a case where the risk was present, *Central Greyhound Lines, Inc.,* 334 U.S. at 660, and the State imposed tax on the entire gross receipts of a bus company with routes passing through other States. Here,

however, the Florida District Court noted that "the use tax is apportioned between the two states with nexus, the state of origin and the state of termination." Sem. Elec. Pet. 5a. And it properly concluded that the State's method of apportionment satisfied the external consistency test and was fair. Given the record, the decision below was amply justified on this point.

2. The test for discrimination does not, in practice, require much more than a showing of fair apportionment. *Container Corporation of America,* 463 U.S. at 171. Florida did not impose a flat-tax at a uniform rate on the privilege of providing transportation services, no matter the extent to which those privileges were enjoyed, as was found discriminatory in *Scheiner,* 483 U.S. 266. *Scheiner* did not consider, and obviously did not decide, the issue presented by the claim of discrimination advanced here: whether a State's apportionment formula must measure value by a method which allocates a portion of the value to other States which, concededly, poses no risk to tax that value. Petitioner's demand for mileage apportionment is simply an argument for partial immunity and was properly rejected. Allocating mileage to States which are admittedly of no threat to impose tax is not constitutionally required.

Petitioner's "effective rate" of tax calculation — Sem. Elec. Pet. 11 — eliminates that part of cost which could be attributed, based upon mileage, to that portion of the service physically performed outside the State. However, Florida taxed this Floridian's use of the service in Florida. But, more importantly, Petitioner cannot justify attributing part of the measure of the tax to States which cannot tax the transaction. The Florida tax structure, like the Louisiana tax structure examined in *D.H. Holmes,* does not discriminate against interstate commerce. Given trips of equal mileage, assuming equal cost, tax is applied at the same rate whether the trip is wholly instate or interstate.

3. Petitioner's argument most clearly falls apart in its analysis of the fourth prong of the *Complete Auto Transit* test — whether the tax is fairly related to the services provided to the taxpayer by the State. The fourth test, closely related to the first, asks the simple question: has the State given anything for which it can ask a return? *Commonwealth Edison Company,* 453 U.S. at 626. Petitioner argues that the analysis of the fourth prong described in *D.H. Holmes* and reaffirmed in *Goldberg* is "the simple test...." Sem. Elec. Pet. 21-22. Petitioner concedes that the Florida trial court did not use the test described in those two cases. Rather, the trial court based its ruling upon its application of *Scheiner. Id.* Petitioner also concedes that the taxpayer in Scheiner was subject to multiple taxation, whereas the taxpayer in *D.H. Holmes* was not. *Id.* at 22. However, Petitioner neglects to note that, unlike the taxpayer in *Scheiner,* it long ago conceded that it was not subject to multiple taxation. Thus, Petitioner's argument on this point is not based upon the record of this case.

II. THE CASE DOES NOT WARRANT REVIEW AS PRESENTING NOVEL QUESTIONS IN A DEVELOPING SPHERE OF STATE TAXATION.

Petitioner has failed to demonstrate that any issue raised by this case is so likely to recur as to require review of the Florida decision. The Florida tax, repealed in 1987, has not been reenacted. Any such future imposition can only be analyzed based upon the particular facts and record which are thereby presented. Florida's Second District Court of Appeal applied well-settled legal principles in a manner entirely consistent with the relevant decisions of this Court in holding the Florida tax valid.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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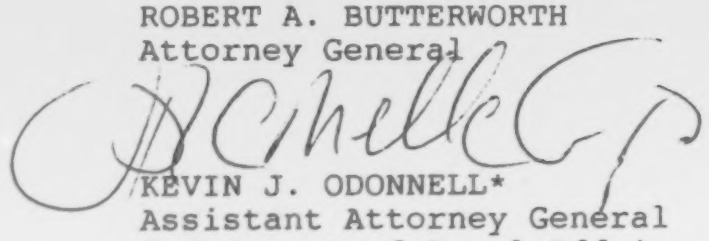
Respondents.

CERTIFICATE OF SERVICE OF
BRIEF IN OPPOSITION FOR RESPONDENTS

Pursuant to Supreme Court Rule 29.3, the undersigned hereby certifies that a true and correct copy of the Brief In Opposition for Respondents has been furnished by U.S. Mail to Robert A. Mora, Esquire, Richard A. Harrison and Wallace B. Anderson, Jr., ALLEN, DELL, FRANK & TRINKLE, 101 E. Kennedy Boulevard, Suite 1240, Post Office Box 2111, Tampa, FL 33602 this 19th day of January, 1993.

Respectfully submitted,

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